

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA**

In re

**DENNIS NORMAN FRANZ and  
MARY LYNN FRANZ,**

Debtors.

Case No. **05-60889-13**

***MEMORANDUM of DECISION***

At Butte in said District this 10<sup>th</sup> day of June, 2005.

In this Chapter 13 bankruptcy, after due notice, a hearing was held June 10, 2005, in Butte on the Motion for In Rem Relief filed by Mortgage Electronic Registration Systems, Inc. (“MERS”) on April 25, 2005.<sup>1</sup> Attorney Michael A. Horton appeared at the hearing on behalf of Debtors and in opposition to MERS’s Motion. Attorney Matthew Kolling appeared at the hearing on behalf of MERS and in support of the Motion for In Rem Relief. No exhibits were offered into evidence but both debtor Dennis Franz and debtor Mary Franz testified. This Memorandum of Decision sets forth the Court’s findings of fact and conclusions of law.

According to its Motion, MERS requests that the Court enter an order: (1) prohibiting Debtors from transferring certain property held by Debtors for a period of 180 days; (2) directing that any bankruptcy filing, voluntary or involuntary, which would impose an automatic stay against the property, be prohibited for at least 180 days; and (3) that Debtors be prohibited from otherwise interfering with MERS’s right to foreclose on the property at issue. In support of its Motion, MERS offered the following factual background, which facts have not been contested by

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<sup>1</sup> In reviewing MERS’s Motion, it appears that MERS is only seeking in rem relief at this time and is not seeking relief from the automatic stay.

Debtors:

On or about November 19, 2001, Debtors took out a mortgage loan for the purchase of certain real property in Gallatin County, Montana ("Subject Property"). Debtors signed and executed a Promissory Note and Deed of Trust evidencing the mortgage loan. The Note, in the original principal amount of \$106,650.00, required Debtors to make regular monthly payments of principal and interest until the debt was fully paid. The Deed of Trust was given by Debtors to secure repayment of the Note, and provided that if Debtors defaulted in making payments, the trustee, at the direction of the beneficiary of the Deed of Trust, had the power to sell the Subject Property at a trustee's sale, as provided by law. The Deed of Trust was duly recorded in the Office of the Clerk and Recorder of Gallatin County, Montana, on December 7, 2001, as Document No. 2054865. The beneficial interest under the Note and Deed of Trust is currently held by MERS.

Debtors have failed to make payments as required under the Note and Deed of Trust. Debtors currently have arrearages on the Note and Deed of Trust totaling \$28,968.52. The last payment made by Debtors on the Note and Deed of Trust was made in June of 2003. After MERS moved to foreclose the Notice and Deed of Trust, Debtors filed for protection under Chapter 13 of the Bankruptcy Code on February 12, 2004.<sup>2</sup> *See* Case No. 04-60295. Case No. 04-60295 was dismissed on March 19, 2004, after Debtors failed to appear at the 341(a) Meeting of Creditors.

Debtors again sought protection under Chapter 13 of the Bankruptcy Code on August 20, 2004. *See* Case No. 04-62587. Case No. 04-62587, however, was dismissed upon motion of the

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<sup>2</sup> Debtors sought protection under Chapter 7 of the Bankruptcy Code on April 19, 1999, and received a discharge of their debts in that case on July 13, 1999.

Trustee on October 26, 2004, for Debtors' failure to file all appropriate tax returns. Thereafter, Debtors commenced the instant Chapter 13 case on April 1, 2005. Based upon the foregoing facts, MERS asserts that "Debtors appear to be filing bankruptcy petitions for the sole purpose of invoking the automatic stay protections and frustrating [MERS's] legitimate foreclosure efforts."

In opposition to MERS's Motion, Debtors argue that in rem relief is an extraordinary remedy and further argue that considerable personal difficulties have frustrated Debtors' efforts to complete a Chapter 13 case. Both Debtors testified that their first Chapter 13 bankruptcy petition, filed without the assistance of counsel on February 12, 2004, was dismissed because Debtors did not understand that they were supposed to attend the 341(a) Meeting of Creditors.

Debtor Dennis Franz testified that he attended the 341(a) Meeting of Creditors held in the second Chapter 13 case on October 5, 2004, but the meeting was continued and Debtor Dennis Franz suffered a stroke prior to the continued meeting. The Court would note that Debtors' second Chapter 13 bankruptcy petition, which was also filed without the assistance of counsel, was dismissed prior to the continued 341(a) Meeting of Creditors because Debtors failed to file all the appropriate tax returns.

In the instant case, Debtors have retained an attorney. Debtors also claim that they have provided the Trustee with everything he needs and it appears that Debtors attended the continued 341(a) Meeting of Creditors held June 7, 2005. The Court's concern centers around Debtors' proposed Chapter 13 plan, which Plan provides for total payments over the life of the Plan of \$12,000.00. Those payments are intended to cover the Trustee's fees, payment of Debtors' counsel and payment of a priority claim owing to the Internal Revenue Service. Debtors' proposed Chapter 13 plan makes no provision for payment of the arrearage owing to MERS, which arrearage is approximately \$28,968.52, according to the pending Motion. Thus, it appears

that Debtors' proposed Chapter 13 plan is under-funded by a sum in excess of \$30,000.00 and it does not appear, after reviewing Debtors' Schedules I and J, that Debtors have the ability to cure the arrearage owing to MERS during the term of Debtors' Chapter 13 plan.

In its brief, MERS cites to *In re Snow*, 201 B.R. 968 (Bankr. C.D. Cal. 1996), in support of its in rem request. *Snow* explains:

An in rem order, which imposes an equitable servitude on the real property at issue, is an extraordinary remedy that should be granted only in extraordinary circumstances. Such extraordinary circumstances arise, in the relief from stay context, only where an ordinary relief from stay order will not be effective, as demonstrated by the prior history of the parties and the property.

The Court finds such extraordinary circumstances in this case, where (1) the debtor received a joint interest in the property with other strangers to the transaction with Great Western who may file bankruptcy cases; (2) this transfer occurred after a previous transferee from the original borrower had filed a bankruptcy case; and (3) the court had granted relief from the automatic stay to the moving party herein in that prior case. Furthermore, the joint ownership of the property among four individuals (and a corporation) indicates to the Court that the owners have planned further mischief to prevent Great Western from foreclosing if extraordinary relief is not granted. Thus the Court finds that this is an appropriate case for granting in rem relief.

*Snow*, 201 B.R. at 976.

Applying *Snow* to the instant case, the Court finds that in rem relief is warranted under the particular facts of this case, but the Court will stay the effect of such relief during the pendency of this case. Debtors have not made a payment on the Note and Deed of Trust for 2 years and it appears from the record and Debtors' Schedule A that Debtors have very little equity, if any, in the Subject Property. Moreover, it does not appear that Debtors have sufficient disposable income at this point in time to adequately fund a Chapter 13 plan. Nevertheless, the Court is willing to give Debtors that opportunity, especially as Debtors have retained counsel to assist them in this case and particularly as Debtors offered a reasonable explanation as to why the

two previous bankruptcy cases were dismissed. However, if Debtors are not able to successfully complete this case, any bankruptcy filing, voluntary or involuntary, which would impose an automatic stay against the property, will be prohibited for at least 180 days from the date this case is dismissed and Debtors will also be prohibited from otherwise interfering with MERS's right to foreclose the property upon the dismissal of this case. In accordance with the above,

IT IS ORDERED that the Court will enter a separate order granting the Motion for In Rem Relief filed by Mortgage Electronic Registration System, Inc. on April 25, 2005, PROVIDED HOWEVER, that the in rem relief will not become effective during the pendency of this case. If this case is dismissed for any reason or if Debtors are not able to successfully complete the terms of a Chapter 13 plan, any bankruptcy filing, voluntary or involuntary, which would impose an automatic stay against the property, will be prohibited for at least 180 days from the date this case is dismissed and Debtors will also be prohibited from otherwise interfering with Mortgage Electronic Registration System, Inc.'s right to foreclose the property following the dismissal of this case.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", written over a horizontal line.

HON. RALPH B. KIRSCHER  
U.S. Bankruptcy Judge  
United States Bankruptcy Court  
District of Montana